COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

AN INVESTIGATION OF ELECTRIC RATES OF LOUISVILLE GAS AND ELECTRIC COMPANY TO IMPLEMENT A 25 PERCENT DISALLOWANCE OF TRIMBLE COUNTY UNIT NO. 1	))))	CASE NO. 10320

O R D E R

This matter is before the Commission for decision on motions of the Attorney General ("AG") and Jefferson County for recusal of two Commissioners and to bar certain Commission staff from participating in the case. These motions were filed on March 25, 1994. On March 29, the Office of Kentucky Legal Services Programs, Inc. ("Legal Services"), joined the motions and on April 6, 1994, Louisville Gas & Electric Company ("LG&E") opposed them.

The premise of these motions is that past statements of the Commission in its Orders and pleadings in this case and others related to it demonstrate that the challenged Commissioners have prejudged the issues currently before the Commission. Movants misapprehend the distinction between prejudice and previous judgment. While the Commission and its Staff are free from prejudice in this matter, the Commission has in fact decided a number of issues in the protracted history of this case which are binding on it and the parties.

This matter was first before the Commission in 1978 as Case No. 7113[1] in which LG&E sought a Certificate of Public Convenience and Necessity to construct two generating units in Trimble County. One was ultimately built and disallowance of 25 per cent of its capacity is at the center of this controversy. Although various intervenors opposed the construction on various grounds, the Commission's grant of the certificate was affirmed by Franklin Circuit Court on July 24, 1980, and affirmed by the Court of Appeals on July 24, 1981. The Kentucky Supreme Court denied discretionary review on March 2, 1982. It is instructive to recall that during the same period, three of the four other generating utilities in Kentucky planned to add generation capacity which ultimately proved unnecessary.[2]

LG&E's first rate case after obtaining its certificate for Trimble was Case No. 7301,[3] filed in 1979. By this time, site work had begun on Trimble and, consistent with Commission policy dating back to the 1940's, a cash return on Construction Work in Progress ("CWIP") was allowed by the Commission. The AG's appeal of this

---

1 Case No. 7113, Application of Louisville Gas and Electric Company for a Certificate of Convenience and Necessity and a Certificate of Environmental Compatibility to Proceed with the Development of a New Four-Unit Electric Generating Station.

2 East Kentucky Power Cooperative obtained approval to construct the Smith plant which was canceled. Big Rivers obtained approval for two generating units at the Wilson facility and subsequently built only one. Kentucky Utilities planned to construct a generating unit in Hancock County which was canceled.

3 Case No. 7301, General Adjustments in Electric and Gas Rates of Louisville Gas and Electric Company.

case was dismissed by Franklin Circuit Court on August 13, 1979. A similar return was allowed in LG&E's next two rate cases, No. 7799[4] and No. 8284[5]. In fact, LG&E's desire to have additional construction expenses added to its rate base was apparently a factor in its decisions to file these rate cases. Case No. 7799 was affirmed by the Franklin Circuit Court on February 4, 1982. The primary issue before the Commission and on appeal was the rate of return on common equity. Rate of return was also the primary issue in case No. 8284 which was not appealed.

Allowing a return on CWIP was first extensively argued in LG&E's fourth rate case after construction began, Case No. 8924.[6] By November 23, 1983, when the case was filed, the eventual completion of Trimble was also an issue. The Commission stated that:

> The most difficult issue in this case is the treatment of CWIP and whether or not ratepayers should be required to pay a return now on plant that is being built, but is not yet in service. The alternatives are to pay it now, or to have LG&E accrue the financing costs and include the accrued financing cost in the investment in the plant. The second alternative means that there will be a larger investment on which a return will be required when the plant is finished.[7]

---

4 Case No. 7799, General Adjustments in Electric and Gas Rates of Louisville Gas and Electric Company.

5 Case No. 8284, General Adjustments in Electric and Gas Rates of Louisville Gas and Electric Company.

6 Case No. 8924, General Adjustment in Electric and Gas Rates of Louisville Gas and Electric Company.

7 Case No. 8924, Order dated May 16, 1984, pp. 27, 28.

After considerable discussion, the Commission decided that LG&E should be allowed to continue to earn a return on CWIP rather than accruing financing costs.

The decision was based on two considerations: accruing financing costs for subsequent inclusion in rate base would likely cause an increase in rates of a substantial magnitude if the plant were completed and would cause an increased liability for ratepayers if the plant were canceled. The Commission was also faced with conflicting arguments about which method would most effectively encourage a final decision on completion of the plant. Recognizing that additional study was underway, the Commission required LG&E to file monthly reports on the status of Trimble so that it could monitor progress on the plant.

Of most importance to the instant case, the Commission made the following statement concerning its decision on CWIP:

> The Commission has decided that, for this case, its historical treatment of CWIP shall continue. However, the Commission hastens to point out that its decision in this case should not be taken as an indication that this treatment will continue indefinitely in future cases.[8]

This case was also appealed to Franklin Circuit Court where the AG argued that the Commission had abused its discretion in allowing a cash return on CWIP. In affirming the Commission's Order in its entirety, the Court held that:

---

[8] Case No. 8924, Order dated May 16, 1984, p. 36

> The ratemaking standard for valuation of property applicable to LG&E, is set forth in KRS 278.290(1). In that statute the PSC is empowered to "ascertain and fix the value of the whole or any part of the property of any utility insofar as the value is material to the exercise of the jurisdiction of the Commission . . . and ascertain the value of all new construction, extensions and additions to the property of the utility." . . . This statute grants the PSC the authority to determine the methodology by which this valuation is made. Its order allowing LG&E to include CWIP in its rate base lies squarely within the PSC's authority to ascertain and fix the value of a utilities (sic) property. The PSC did not abuse its authority and its order on this point is amply supported by the evidence in the record.[9]

Consistent with its actions in Case No. 8924, the Commission initiated an investigation of the need for the Trimble County plant in December, 1984, Case No. 9243.[10] The Commission subsequently stated that "the primary issue in [the] proceeding [was] whether

---

[9] Opinion, p. 6. At p. 4 of the Opinion, the Court cited Jefferson County Fiscal Court v. Public Service Commission, 29 PUR 4th 143 (Franklin Circuit Court 1979), a case involving CWIP which arose prior to Trimble. The opinion contains the following language: "The Commission was on sound ground when it allowed LG&E to include CWIP in the rate base. The evidence is uncontradicted that, for many years, LG&E (with commission approval) has included CWIP in its rate base, but it has not increased its earnings by an allowance for funds used during construction (AFUDC). Therefore, LG&E's rate base is smaller, and its revenue requirements are less than they would have been had its rate base included an AFUDC component. There is respectable authority for the proposition that the policy of including CWIP in the rate base, and of paying for construction costs currently, instead of mortgaging the future, is the sounder approach, because it costs consumers less in the long run. . . . The commission was entitled to adopt that view, and this court should not, and indeed, it cannot accept appellants' invitation to stick its 'judicial fingers' in the 'ratemaking pie,' . . . ." (Citations omitted.)

[10] Case No. 9243, An Investigation and Review of Louisville Gas and Electric Company's Capacity Expansion Study and the Need for Trimble County Unit No. 1.

the Trimble County Unit No. 1 should be completed and, if so, when it should be completed."[11] After thorough review of LG&E's capacity expansion study, the Commission concluded that LG&E should delay the completion of Trimble County Unit No. 1 for at least three years beyond its then planned 1988 in-service date.

Of most interest to the present proceeding, the Commission reiterated its prior statement that the parties should be on notice "that in future rate cases, the continuation of allowing a return on further additions to CWIP" related to Trimble would be an issue.[12] Neither this Order nor the subsequent Order on rehearing, which directed LG&E to use July 1991 as the completion date for planning purposes, stated or inferred that prior additions to CWIP would be subject to review. The Order on rehearing did state that the Commission would undertake a formal review of Trimble in approximately one year. This case was not appealed.

The contemplated review began on May 27, 1987, when the Commission initiated Case No. 9934.[13] While Case No. 9934 was pending, LG&E filed a rate case on November 11, 1987, Case No. 10064.[14] Final Orders were issued in both these cases on July 1, 1988.

---

11 Case No. 9243, Order dated October 14, 1985, p. 3.

12 Id., at p. 25, emphasis added.

13 Case No. 9934, A Formal Review of the Current Status of Trimble County Unit No. 1.

14 Case No. 10064, Adjustment of Gas and Electric Rates of Louisville Gas and Electric Company.

The final Order in Case No. 9934 concluded that LG&E's plans to complete Trimble in 1991 were reasonable, that additional delays were not justified, and that there was no clear advantage to completing the plant versus canceling it.[15] However, there was a significant economic advantage for selling 25 percent of Trimble as recommended by LG&E's consultant, and buying other capacity in later years when needed. After expressing concern with LG&E's efforts to that time to sell a portion of Trimble capacity, the Commission found that it was,

> ...necessary to develop some form of rate-making treatment that will assure the ratepayers that they will receive the benefits of the reduced revenue requirements that would result if such a sale occurred.[16]

To this end, the Commission disallowed 25 per cent of the plant and stated that it would initiate another proceeding to investigate the various rate-making alternatives available to,

> ...assure the ratepayers of LG&E that they will receive the benefits of the reduced revenue requirements which would result if LG&E sold a 25 percent joint ownership interest in Trimble County. . . .[17]

On the same day, the Commission issued its rate Order in Case No. 10064. There, the prior admonition that the historical treatment of CWIP should not be assumed in the future was discussed in light of the decision to disallow 25 per cent of the plant and institute a further investigation. Pending that investigation, the

---

[15] Case No. 9934, Order dated July 1, 1988, pp. 9 and 28.

[16] Id., p. 32.

[17] Id., p. 35.

Commission held that "...all revenues associated with additions to CWIP since LG&E's last rate case should be collected subject to refund."[18] The Commission further stated that,

> [A]pplying the overall rate of return allowed in this case to the increase in Trimble County CWIP of $114 million results in an annual provision of $11.4 million to be collected subject to refund.[19]

Appeals to Franklin Circuit Court in both 9934 and 10064 were perfected by LG&E and subsequently dismissed pursuant to the ill-fated settlement in the instant case. Regardless of the circumstances leading to their dismissal, the appeals of the final Orders in Cases No. 9934 and No. 10064 were in fact dismissed. Therefore, the final Orders in those cases, like all the other Orders in the prior LG&E cases relating to Trimble and rates during its construction, have never been overturned. To the extent applicable, they are binding on the Commission and on the parties.[20]

This recitation of past events ends at the instant case in which the Commission approved a settlement over the objection of the AG and other intervenors. After a lengthy appellate process, the Kentucky Supreme Court affirmed the Court of Appeals decision which found the settlement process contrary to the recently decided

---

[18] Case No. 10064, Order dated July 1, 1988, p. 10. Emphasis added.

[19] Id., pp. 10 and 11, emphasis added.

[20] "It is as obvious as the Acropolis of Athens that an order of the commission continues in force until revoked or modified by the commission or unless suspended or vacated in whole or in part by the Franklin Circuit Court." Com. Ex Rel. Stephens v. So. Cent. Bell Tel. Co., Ky., 545 S.W.2d 927, 931 (1976).

Kentucky-American decision[21] and directed the Commission to hold a full evidentiary hearing in this matter.[22]

The directive from the Kentucky Supreme Court is likely sufficient answer of itself to the recusal motion. The history of this case and the Trimble cases preceding it were before the appellate courts. They were clearly capable of ordering the Commission to hold a full evidentiary hearing and further to decide this case without the participation of two of its Commissioners. In fact, the AG encouraged the appellate courts to preclude a hearing before the Commission arguing that they should fashion a remedy rather than remand the case to be heard by these Commissioners. This the Court could have done if it were so inclined and if it were prepared to answer the further question presented by the recusal motion, i.e., if not by these two Commissioners, by whom?

KRS 278.080 provides that a majority of the Commissioners is necessary for transaction of any business. Therefore, if two current commissioners were precluded from participating in the decision of this case, the Commission could not decide it until one of them were replaced by a new commissioner pursuant to KRS 278.050. Nothing in the appellate opinions in this case evinces an

---

21 Kentucky-American Water Company v. Com. ex rel. Cowan, Ky.App., 847 S.W.2d 737 (1993).

22 Louisville Gas and Electric Company v. Com. ex rel. Cowan, Ky.App., 862 S.W.2d 897 (1993), Disc. Rev. denied.

intent on the part of the courts that the Commission wait for the passage of at least another year before this case moves forward.[23]

These bases for decision, however sufficient they may be, do not address the real contention underlying the AG's motion. After six pages of discussion replete with lengthy quotes from various Commission Orders and pleadings in this case, the penultimate paragraph of the motion distills both the AG's casus belli and his refusal to come to terms with reality:

> Commissioners Overbey and Davis and affected staff improperly prejudged and limited the scope of the issues to be decided in this proceeding even before the original 10320 proceeding was underway.[24]

The AG is correct that the scope of the issues to be decided in this proceeding was decided even before it began. However, this in no way involved prejudice or impropriety.

As the labored recitation of the history of this case demonstrates, Commissioners Overbey and Davis were not even on the Commission when the initial decisions were made. The Order in Case No. 9243, in which the Commission placed the parties on notice that in future rate cases the continuation of allowing a return on further additions to Trimble CWIP would be an issue, was signed by Commissioners Heman, Dozier, and Williams. Put another way, the scope of this case has been limited since at least 1985. How this could amount to prejudice or impropriety on the part of either

---

[23] See discussion of the 'rule of necessity' in Southwestern Bell Telephone Co. v. Oklahoma Corp. Com'n, No. 80,579, 1994 WL 136010, at pages 8 and 9, and cases cited therein (OK. April 13, 1994).

[24] Motion, p. 7.

Chairman Overbey, Vice Chairman Davis, or any member of Commission staff is simply beyond comprehension.

Commission Orders are appealable under KRS 278.410. It has been the usual practice of parties and preference of the courts and the Commission that appeals await a final disposition of all issues before the Commission. In special circumstances, appeals have been allowed by the courts prior to final disposition. This case has been a special circumstance for almost fifteen years. This Order deals with a challenge to the very ability of the Commission to function and determine the scope of the proceedings before it. Any party wishing to challenge these rulings should do so now before the Commission and the parties have been subjected to another hearing in this matter which, if the AG is correct, would be void ab initio. The Commission will therefore await passage of the statutory appeal time before taking any further action in this case.

IT IS THEREFORE ORDERED that:

1. The March 25, 1994, Motion to Recuse/Motion to Remove Staff filed by the AG and Jefferson County, and joined by Legal Services is denied.

2. The Motion of Louisville Gas And Electric Company to Amend Procedural Order to Provide for (1) Supplemental Information Requests and (2) Rebuttal Testimony is denied as moot.

3. This is a final and appealable order and there is no just cause for delay.

Done at Frankfort, Kentucky, this 8th day of July, 1994.

PUBLIC SERVICE COMMISSION

Chairman

Vice Chairman

Commissioner

ATTEST:

Executive Director